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# Compliance with Non-Binding Norms of Trade and Finance

David A. Wirth

*Boston College Law School, [wirthd@bc.edu](mailto:wirthd@bc.edu)*

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## *Compliance with Non-Binding Norms of Trade and Finance*

DAVID A. WIRTH

The studies collected in this chapter are emblematic of the wider universe of non-binding instruments, illustrating the flexibility in substantive content and procedural context that is a principal hallmark of non-binding undertakings. Taken as a group, the studies reveal cleavages characteristic of the legal and policy dynamics surrounding non-binding instruments, as they vary in: (1) choice of non-binding rather than binding format; (2) institutional setting; (3) relationship to binding international law; (4) identity of norm-creating entities; (5) identity of parties addressed; (6) processes for adoption and implementation; (7) impact on domestic policy and law; and (8) the role of the public in norm formulation, implementation, and compliance.

Beth Simmons' analysis highlights many attributes of a 'classical' or 'traditional' non-binding vehicle, to the extent such a model can be identified among the extraordinarily diverse examples assembled in this volume. Her study consequently is useful as a benchmark, providing a reference point against which the others can be compared. The Forty Recommendations of the Financial Action Task Force (FATF) are a policy response to an archetypal collective action problem: how to overcome the incentives inherent in the decentralized and consent-based international system, which often rewards holdouts, scofflaws, free riders, and laggards. As described by Professor Simmons, the efforts of the United States to encourage or, indeed, leverage higher standards of performance on the part of other states—to 'harmonize up'—was a principal motivating factor explaining the nature of the FATF's activities generally and the Forty Recommendations in particular.

Professor Simmons identifies characteristics frequently cited as benefits of a non-binding approach, which might be described as the 'choice of instrument' question. The commitment of states other than the United States is described as tentative or equivocal. In such a context, states might commit to binding obligations only of a modest character, if at all, while a non-binding 'soft' instrument can allow them to gain experience with more ambitious, aspirational goals in a less risky milieu. non-binding instruments also may be appropriate for circumstances in which consensus is elusive or illusory. Thus, they may be attractive alternatives to an inertial downward spiral towards the 'least common denominator' characteristic of many multilateral efforts. For these reasons, among others, non-binding instruments are often phrased, as

are the Forty Recommendations, in hortatory 'shoulds' rather than obligatory 'shalls'. Perhaps somewhat unexpectedly, a non-binding format characterized by a sense that less is at stake in a legal sense may also facilitate more vigorous compliance mechanisms than might be expected in a binding international agreement. The FATF's mutual evaluation mechanism described by Professor Simmons clearly falls into this category. The monitoring process accompanying the Forty Recommendations capitalizes on the non-binding format's flexibility, facilitating transparency as to the activities of participating states, helping to ensure compliance, and allowing elaboration of general principles for particular situations.

The Forty Recommendations, while adopted by states, also are addressed directly to private actors, primarily financial institutions. The character and status of non-state actors makes the binding international agreement a considerably less-well suited form of regulatory instrument. In formal terms, treaties and other international agreements are concluded only among states or other subjects of international law, not with or among private actors. Acting as desirable or necessary intermediaries, states parties to a treaty may undertake to regulate the behavior of private actors within their jurisdiction. In the area of trade and finance, where the private sector predominates and is the primary targets of norms, non-binding instruments, despite their nonbinding character, become appealing vehicles through which states can establish expectations. The latter are often phrased as 'good practice standards' and are transmitted directly to nonstate actors without the necessity for government regulatory action.

The ease of amendment identified by Professor Simmons is another advantage frequently attributed to a non-binding format. The Forty Recommendations were adopted originally in 1990 and 'revised in 1996 to reflect changes in money laundering trends',<sup>1</sup> apparently with a minimum of procedural complexity. The use of the nontechnical description 'revised' is telling, as the analogue in treaty practice would be an amendment to a binding multilateral agreement. Under customary international law, an amendment to a multilateral treaty is in effect a new agreement, binding only those states that indicate their affirmative intent to accept the new obligations.<sup>2</sup> States ordinarily

<sup>1</sup> Financial Action Task Force on Money Laundering, *Annual Report 1997–1998*, O.E.C.D. Doc. FATF-IX 6 (June 1998) (<[http://www.oecd.org/news\\_and\\_events/release/FATF98.PDF](http://www.oecd.org/news_and_events/release/FATF98.PDF)>). The 1996 revision of the Recommendations can be found at Financial Action Task Force on Money Laundering, *Annual Report 1995–1996*, Annex 1 (June 28, 1996) (<<http://www.oecd.org/fatf/pdf/96ar-e.pdf>>).

<sup>2</sup> See Vienna Convention on the Law of Treaties, May 22, 1969, Art. 40, 1155 U.N.T.S. 331, reprinted in (1969) 8 I.L.M. 679. The Vienna Convention is ordinarily considered a codification of most customary international law concerning treaties. For example, this instrument, although not in force for the United States, has been accepted there as an authoritative source regarding the customary law of international agreements. See S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971); Restatement (Third) of the Foreign Relations Law of the United States pt. III, introductory note (1987).

indicate their assent to an amendment through the often time-consuming and cumbersome processes of signature, ratification, and acceptance.<sup>3</sup> One obvious consequence of this rule is the potential to create classes of parties with different obligations, an undesirable situation in multilateral surroundings whose principal purpose is to encourage concerted action by states.

Another aspect of Professor Simmons's subject that makes it a typical non-binding initiative is the 'choice of forum', the fact that the efforts were undertaken in connection with the Organization for Economic Cooperation and Development (OECD). The decision to treat the subject matter of money laundering in this institutional setting appears far from coincidental. One senses that the OECD, often described as a 'club' of wealthy developed market-oriented economies, was a desirable venue precisely because of its limited membership of like-minded states characterized by a sense of shared outlook and purpose. In such a framework, the identification of common goals may well be easier than in an organization with universal membership, such as a specialized agency or program of the United Nations. As a corollary to this principle, once a grouping such as the OECD has overcome the impediments to joint action among its own members, it is in a position to exert significantly enhanced leverage over outsiders. Professor Simmons' description of the treatment of nonmembers by the FATF is a classic example of this phenomenon.

The OECD's constituent multilateral treaty anticipates the adoption of non-binding recommendations and binding decisions.<sup>4</sup> The FATF instead started as an OECD 'project' but subsequently evolved into an *ad hoc* non-binding undertaking involving OECD members and nonmembers. As described by Professor Simmons, the FATF now has its own secretariat specifically crafted to meet the substantive and institutional demands presented by the subject matter and identified by the participating states. The Forty Recommendations do not have the character of, and arguably have less binding force than, formal recommendations within the meaning of the OECD treaty. But as Professor Simmons points out, such legal distinctions are largely irrelevant to the efficacy of the FATF's work, which is more determined by the participating states' collective political will than by the niceties of legal form.

<sup>3</sup> A particular agreement may specify another procedure. *E.g.*, Montreal Protocol on Substances That Deplete the Ozone Layer, September 16, 1987, art. 2, para. 9, S. Treaty Doc. No. 10, 100th Cong., 1st Sess. (1987), reprinted in (1987) 26 I.L.M. 1550, adjusted and amended, June 29, 1990, S. Treaty Doc. No. 4, 102d Cong., 1st Sess. (1991), reprinted in (1991) 30 I.L.M. 539, adjusted and amended, November 25, 1992, S. Treaty Doc. No. 9, 103d Cong., 1st Sess. (1993), reprinted in (1993) 32 I.L.M. 875 (adjustments binding on all parties adopted by two-thirds majority of parties to parent instrument).

<sup>4</sup> Convention on the Organization for Economic Cooperation and Development, December 14, 1960, art. 5, paras. (a) and (b), 12 U.S.T. 1728, T.I.A.S. No. 4891, 888 U.N.T.S. 179. See, *e.g.*, Organization for Economic Co-operation and Development, *OECD and the Environment* (1986) (collecting OECD decisions and recommendations on environment).

The FATF's work, like many non-binding efforts, is embedded in a complex web of binding agreements, such as the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and other non-binding instruments and initiatives. The FATF thus performs another oft-cited function of non-binding initiatives: filling gaps and holes in binding regimes. The less formal venue of the FATF provides an alternative channel for treating money laundering against a background of few ratifications of the binding Vienna Convention.

Read against the baseline of the FATF study, Laurence Boisson de Chazournes' analysis of the World Bank's policies is a useful study in contrasts. Perhaps most obviously, where the FATF's Forty Recommendations identify a specific subject matter characterized by relatively straightforward problems and goals, the World Bank's operational policies are a quite conscious attempt to integrate and balance competing themes in the Bank's functional mission, which historically has been defined primarily in economic terms. Until roughly a decade ago, the Bank was resistant to incorporating social welfare concerns such as human rights, environment, the interests of indigenous peoples, and labor standards<sup>5</sup> into its work. In the FATF a non-binding approach is employed directly to advance readily identifiable policy goals through an *ad hoc*, freestanding structure. The Bank's operational policies described by Professor Boisson de Chazournes are intended instead to encourage the penetration of exogenous social policy factors into the operations of an existing international institution by modulating, regulating, and constraining what might be described as the natural institutional momentum of the Bank.

The situation described by Professor Boisson de Chazournes is not set out in the World Bank's constituent treaties,<sup>6</sup> but instead has been crafted in a less formal context to occupy interstices in the Bank's institutional structure. No explicit provision in the Bank's constitutional instruments governs the generic sort of policies that guide the Bank's discretion in approving particular proposals for loans and credits, nor is there any indication of a procedure by which those instruments can or must be adopted. Likewise, there is no express legal authorization for the Inspection Panel, which was created by resolution of the Bank's Board of Executive Directors.<sup>7</sup> To that extent, these

<sup>5</sup> See e.g., (1988) 82 *Proc. Am. Soc'y Int'l L.* 41, 42 (remarks of Ibrahim Shihata, Vice President and General Counsel, World Bank, noting that '[i]n the case of the World Bank, its Articles of Agreement entrust the organization with specific functions and responsibilities—all of them related to economic growth, reconstruction, and development').

<sup>6</sup> See Articles of Agreement of the International Development Association, January 26, 1960, 11 U.S.T. 2284, T.I.A.S. No. 4607, 439 U.N.T.S. 249; Articles of Agreement of the International Bank for Reconstruction and Development, December 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, amended August 25, 1965, 16 U.S.T. 1942, T.I.A.S. No. 5929.

<sup>7</sup> See I.B.R.D. Res. No. 93-10; I.D.A. Res. No. 93-6 (September 22, 1993), reprinted in (1995) 34 I.L.M. 503. See generally Shihata, I.F.I., *The World Bank Inspection Panel* (1994).

vehicles can be viewed as performing a gap-filling function similar to that of the Forty Recommendations. The analogy is limited, however, because in the World Bank the lacunae arise in the structural framework of an existing international institution with a continuing operational mission; the interstices in the international system occupied by the FATF, given the existence of a reasonably comprehensive binding instrument, are instead more plausibly described as ones of political will expressed as the failure of targeted states to ratify and implement the agreements.

That the World Bank's constituent treaties do not expressly anticipate an approach of the kind described by Professor Boisson de Chazournes does not suggest that such a strategy is necessarily ineffective. On the contrary, the Inspection Panel is the first instance in which any multilateral institution has submitted the question of the adequacy of its own operations to external review. At least in principle, the interlocking system of the Bank's operational standards and its Inspection Panel provides a comprehensive structure for application and implementation of a system of good practice standards in the Bank's day-to-day work. Indeed, given the Bank's institutional structure and the opportunities in the project cycle at which internal decision making might be amenable to external input, it would be difficult to identify a different or a better approach.

The World Bank study presents an interesting permutation on the categorization of non-binding or 'soft' norms and binding or 'hard' law, and of the relationship between them. First, it would probably be a mistake to characterize the Bank's operational standards as 'soft' or non-binding as a categorical matter. As Professor Boisson de Chazournes points out, certain categories of these instruments, including the Bank's 'Good Practices', are no more than precatory by their own terms. Others, such as the new 'Operational Policies' and 'Bank Procedures', are more often phrased in obligatory language. The Bank staff clearly views the application of the latter instruments as nondiscretionary and private parties can enforce the policies and procedures through the mechanism of the Inspection Panel.

The Bank's operational standards, whether mandatory or discretionary, apply to the institution's professional staff, not to borrowing countries, and consequently cannot bind the latter as a formal matter. World Bank loan agreements, however, have a status in international law similar to that of binding treaties<sup>8</sup> and are enforceable by the Bank against the borrower. To the extent that the covenants in the loan agreement explicitly or implicitly incorporate the Bank's operational standards, those standards become transformed or 'hardened' into binding legal obligations. While the Inspection Panel mechanism as a formal matter does not apply to allegations made

<sup>8</sup> See Nurick, L., 'Certain Aspects of the Law and Practice of the International Bank for Reconstruction and Development', in Stephen M. Schwebel (Ed.), *The Effectiveness of International Decisions* (1971) 100, 127 (statement by World Bank Deputy General Counsel).

against borrowing country governments directly, through that channel private parties can scrutinize the adequacy of Bank staff's performance at two major junctures: (1) in the design and appraisal of individual loans; and (2) in Bank staff's oversight of borrowers' contractual obligations. The Bank's internal standards are relevant and, at least when phrased in those terms, binding in both these settings. Consequently, although not formally binding on borrowing country governments, the Bank's operational standards are likely to have significant legal and practical implications for borrowers, both internationally and domestically.

A revealing dynamic arises in the application of standards external to the Bank in the design and appraisal of loans. As noted by Professor Boisson de Chazournes, the Bank makes use of a number of non-binding normative instruments of external origin, such as the FAO Code of Conduct on the Distribution and Use of Pesticides, in its operations. The good practice standards contained in such instruments may inform or be incorporated by reference in internal policies, such as the Bank's Operational Policy on Pest Management, which expressly cites the FAO Code. References such as this to external standards may perform a useful legitimating function within the Bank, while legally, through a process similar to that characteristic of the Bank's internal standards, these advisory instruments may be transformed into binding loan covenants.

The Bank's policies specify that the institution 'will not finance projects that contravene an international environmental agreement *to which the member country concerned [i.e., borrowing country] is a party*'.<sup>9</sup> In other words, in the case of binding obligations the Bank will insist that borrowers comply only with those they have already undertaken, at least in the environmental field. This limitation presumably is motivated by a recognition that, unlike non-binding instruments, international agreements have identifiable parties and that the borrower concerned should not be held to obligations it has shown itself unwilling to accept.

It is clear that this reluctance to rely on multilateral agreements to which a borrower is not party as a standard of good practice arises from policy sensitivities and not legal impediments. The key factor distinguishing a loan agreement with the Bank from an unratified multilateral agreement is that in every instance the consent of the borrowing country government to the terms of a loan agreement with the Bank is a necessary condition precedent to the conclusion of that agreement. If the borrower agrees to the terms on which the loan is offered, then the loan agreement with the Bank operates *per se* as a consensual derogation of sovereignty that is no different from any other international agreement to which the borrowing country is party. If, on the

<sup>9</sup> World Bank Operational Manual Statement No. 2.36: Environmental Aspects of Bank Work 9(e) (May 1984), reprinted in Shihata, *supra* note 7, at 137 (emphasis supplied).

other hand, the borrower rejects the terms proposed by the Bank, there are no international legal consequences because the borrower has no right to the loan and has voluntarily declined to enter into the agreement.

The principle as stated in the Bank's policy, moreover, is belied by the institution's own practice. Barber Conable, President of the Bank at the time of the adoption of the Basel Convention on Transboundary Movements of Hazardous Wastes, is reported to have directed Bank staff to refrain from financing projects involving international shipments of toxic detritus.<sup>10</sup> The Bank's policy thus appears to be more stringent than the obligations contained in the relevant international instrument. While borrowers may not appreciate such an approach, the Bank has both the authority and responsibility to determine loan conditionality according to its own standards, regardless of whether those policies arise strictly from within the institution or are informed by 'soft' or 'hard' sources of external origin. Additionally, promoting wider ratification of multilateral environmental agreements is both a desirable and a legitimate element of the Bank's operational mandate.

The Bank's practice is less clear about customary international law. The Bank 'will not finance projects that could significantly harm the environment of a neighboring country without the consent of that country'.<sup>11</sup> This requirement closely tracks a customary standard prohibiting transboundary pollution as found, for instance, in Principle 21 of the Stockholm Declaration. Otherwise, customary international legal standards do not appear to operate as a constraint on the Bank's operations, either as a matter of principle or of practice. On the other hand, the Bank's policy on international waterways mirrors customary norms in this area, presumably as a policy consideration not compelled by international law, at least from the Bank's point of view.

The resolution creating the Inspection Panel contains some potentially significant limitations on its authority that are of particular interest in the instant context. The Panel, pursuant to the resolution creating it, is confined to considering 'a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank'. The Bank's 'operational policies and procedures' referred to in the resolution creating the panel do not necessarily reflect binding customary norms even in such areas as human rights, let alone the good practice standards contained in non-binding multilateral instruments. Just as there is no legal impediment to reliance on non-binding instruments or treaties to which the borrower is not a party in crafting loan conditions and covenants, there is similarly no legal reason why Bank policies and practices

<sup>10</sup> See, e.g., Land, T., 'Managing Toxic Waste: International Regulation of Hazardous Waste Materials', *The New Leader*, November 27, 1989, at 4 (available in Lexis, News file) ('the World Bank . . . has announced that it will refuse to finance any development project and [sic] involves the disposal of another country's toxic waste').

<sup>11</sup> World Bank Operational Manual Statement No. 2.36, *supra* note 9, ¶ 9(f).



cannot incorporate customary norms, subsequently to be enforced through the Inspection Panel process.

In the case of customary legal obligations, there is a compelling argument precisely to the contrary. As a public, multilateral, intergovernmental organization, the Bank is considerably more than just an agent of borrowing country governments. Instead, the Bank, whose membership is now nearly universal, is accountable to the international community as a whole and is consequently under an obligation not to act inconsistently with international law. In other words, the Bank's Articles of Agreement ought to be read in light of customary international law binding on the Bank's member states and the Bank itself as subjects of public international law.<sup>12</sup> One might well argue that international law precludes the Panel from taking action contrary to customary norms and that the Inspection Panel would be a natural forum for enforcing such customary norms. In the case of a non-binding instrument, these legal arguments admittedly do not have the same force. It would nonetheless appear to be only natural, and certainly appropriate, to assume that widespread, generally accepted multilateral standards contained in non-binding instruments would presumptively apply in the Bank's lending operations.

As described in Lyuba Zarsky's contribution, the Asia-Pacific Economic Cooperation Forum (APEC) is an example of an organization whose entire existence rests on 'soft' or non-binding instruments. APEC, unlike the OECD and the World Bank, has not been established by a binding multilateral agreement. Although instruments such as the 1994 Framework of Principles address APEC's states as 'members', one hesitates to use the term 'organization', let alone 'international organization', in characterizing such a loosely structured arrangement. The most obvious comparison is with the World Trade Organization (WTO), which, even in its earlier incarnation as the General Agreement on Tariffs and Trade, evinced a considerably more sophisticated institutional structure than does APEC. In recent years, the GATT/WTO regime has evolved a more formal and rule-based institutional structure, while APEC has consciously and purposefully chosen an alternative, more loosely textured path to trade liberalization and economic integration. As Ms Zarsky suggests, one consequence of APEC's relatively informal institutional structure may well be flexibility and speed, attributes characteristic more generally of non-binding undertakings.

Naomi Roht-Arriaza's study of the International Organization for Standardization (ISO) rings a further set of changes on these themes. In the case studies of the FATF, the World Bank, and APEC, the entities

<sup>12</sup> See International Agreements on Environment and Natural Resources: Relevance and Application in Environmental Assessment (March 1996) (publication of Environment Department of World Bank updating Environmental Assessment Sourcebook) (stating that '[t]he World Bank, an organization created and governed by public international law, undertakes its operations in compliance with applicable public international law principles and rules').

adopting the relevant non-binding standards are subjects of international law, vehicles through which sovereign states act collectively to express their will. ISO is different; it is not an intergovernmental organization.<sup>13</sup> Moreover, in the three previous case studies the non-binding norms are directed either at states alone or at states and private parties. FATF's Forty Recommendations target both states and private parties. The World Bank's policies apply to its own professional staff, with indirect but palpable collateral effects on borrowers. The member states of APEC coordinate policies for and among themselves, although certainly with significant effects on private transactions and nongovernmental actors. In contrast, ISO voluntary standards deal solely with the behavior of private parties, generally industry. At least as far as the United States is concerned,<sup>14</sup> ISO standards are a somewhat curious example of international non-binding instruments adopted by and directed to private entities, amounting to a system of voluntary self-regulation by the principal stakeholders. To that extent, ISO presents a fundamentally different setting for private parties from that identified in the APEC case study, which concerns attempts by nonstate actors to influence a quintessentially intergovernmental process.

The municipal legal and policy implications of ISO standards necessarily vary from country to country. Some observers have expressed concern that countries with poorly developed regulatory infrastructures may eschew national regulation, instead adopting wholesale the ISO 14000 series of standards without regard for the fundamentally process-oriented approach of this voluntary instrument. For example, by the express terms of the standard a company may be ISO 140001 certified notwithstanding outstanding regulatory violations. Even proponents of the new ISO standards admit that they are at most complements to, and not substitutes for, performance-based criteria such as emission limitations for air and water pollutants. In the United States, federal officials are encouraged to participate in the establishment of voluntary consensus standards, including ISO efforts, which then may be appropriate candidates for application through binding regulatory require-

<sup>13</sup> ISO is an international federation of standardizing bodies from 118 countries and is not an intergovernmental organization, typically established by multilateral agreement, whose members are states represented by governmental authorities. ISO's work product consists of voluntary standards, which are addressed directly to private parties and are not binding under international law.

<sup>14</sup> Some countries are represented in ISO by national standardizing bodies that are governmental entities. The United States member of ISO, however, is the American National Standards Institute (ANSI), a private entity. For the United States, the primary, although not sole, participants in ISO processes are representatives of private industry. At least for the United States, the private, voluntary character of international standards adopted by ISO mirrors similar undertakings with respect to standards on the national level. See, e.g., Hamilton, R.W., 'The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health', in *Administrative Conference of the United States, Recommendations and Reports* (1978) 247, reprinted in (1978) 56 *Tex. L. Rev.* 1329.

ments.<sup>15</sup> But federal agencies may use governmental standards adopted by a nongovernmental entity like ISO only as hortatory guidance for agency regulatory activities, which must be reevaluated by reference to appropriate statutory standards.<sup>16</sup>

The relationship of ISO standards to 'hard' international law, as well as to domestic law, has recently become complex, in large measure due to the Uruguay Round of Multilateral Trade Negotiations. As a result of the relatively obvious trade benefits from harmonized standards such as those promulgated by ISO, the new Agreement on Technical Barriers to Trade (TBT Agreement), expressly references voluntary international standards. The TBT agreement establishes that 'standards', as that term is used in that text, may include voluntary guidelines adopted by an 'international standardizing body', a term which appears intended to include ISO. Although standards adopted by ISO are non-binding instruments addressed directly to private entities, the TBT agreement then goes on to specify that governmentally established requirements or 'technical regulations' shall be based on those standards. Governmental regulations that conform to the standards adopted by an international standardizing body are presumptively legitimate.<sup>17</sup> Many regulatory requirements that have environmental or public health implications, including specifications for consumer products such as children's toys, appliance efficiency criteria, and vehicle fuel efficiency standards, are potentially covered by the Uruguay Round TBT agreement.

Professor Roht-Arriaza describes the status of ISO standards under the TBT Agreement as 'privileged'. It may also be asserted that the TBT Agreement 'hardens' ISO standards into binding law, at least under some circumstances. In the structure of the TBT agreement, those national regulatory requirements that are not based on the output of an international standardizing body are particularly vulnerable to challenge as unnecessary obstacles to international trade. The governmental requirements that are most likely to create impediments to international trade are those that are more rigorous than the international requirements, which may well be the product of a least-common-denominator consensus in an industry-dominated forum. The result is that, through a trade agreement, the expectations of what, at least from the point of view of the United States, is a *private* standardizing organization are

<sup>15</sup> E.g., National Technology Transfer and Advancement Act of 1995, § 12(d), Pub. L. No. 104-113, 110 Stat. 775 (1996); Office of Management and Budget Circular No. A-119, ¶ 6(a) & (b), 58 Fed. Reg. 57,643 (October 26, 1993); 61 Fed. Reg. 68,312 (December 27, 1996) (proposed revisions to OMB Circular A-119).

<sup>16</sup> See, e.g., Office of Management and Budget Circular No. A-119, *supra* note 15, ¶ 7(a)(6); 61 Fed. Reg. 68,312 (December 27, 1996).

<sup>17</sup> An analogous passage in NAFTA sets out a similar approach. North American Free Trade Agreement, December 8, 11, 14 and 17, 1992, U.S.-Can.-Mex. arts. 905 and 915, reprinted in 32 I.L.M. 296, 612 (1993) (use of international standards, defined as 'a document, approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics . . . with which compliance is not mandatory').

transformed into an outer limit of rigor—a ceiling—for *public* regulation to protect health and environment in the United States. Like the vast bulk of international trade agreements, the Uruguay Round TBT agreement is asymmetric, in that it establishes no analogous minimum standards of performance.

The requirements of the Uruguay Round TBT Agreement and other trade agreements initially may appear similar to those in the United States, such as OMB Circular A-119, which counsel reliance on ISO standards to the extent consistent with statutory mandates. In actuality, however, the two cases are very different. The OMB Circular authorizes consistency where possible with ISO standards as non-binding advisory guidelines, but it reasserts the primacy of Congressionally-enacted legislative requirements. In a domestic proceeding for judicial review, a court in principle should apply the statutory test without regard to a privately agreed standard in a forum such as ISO. By way of contrast, the recent trade agreements establish the *private* standard as a reference point and require *public* authorities to justify departures, especially those tending in the direction of more rigorous requirements. This situation in effect bootstraps a nongovernmental standard into one with binding significance for governmentally-established regulatory requirements, at least as a matter of international law. Departures from the benchmark standard can then be challenged by foreign governments through the efficacious trade agreement dispute settlement process. In other words, operating through the TBT agreement, non-binding ISO standards may acquire international legal significance, may be transformed from minimum standards of performance into regulatory ceilings from which governments must justify departure in terms of greater rigor, and, at least from the U.S. point of view, may metamorphose from strictly private, non-binding instruments to standards with significance under public law.

The impact within the United States may be considerable. Adverse reports of trade agreement dispute settlement panels, like the agreements themselves, are binding on the United States as a matter of international law. While those same reports are without domestic legal effect and as a formal matter cannot alter domestic statutory standards, the reports as a practical matter may have significant legal impact in domestic administrative and judicial proceedings.<sup>18</sup> Moreover, through their implementing legislation, the trade agreements are given the effect of binding domestic law and may preempt state law.

Professor Roht-Arriaza highlights an important issue that pervades the other three case studies as well, either expressly or by implication: public participation in international processes. An ever-increasing demand for mechanisms responding to the interests, needs, and inputs of a variety of private parties is characteristic of many international processes, both 'hard' and 'soft'. In general, one can identify at least two critical points in the life of an international 'soft law' instru-

<sup>18</sup> See generally Wirth, D.A., 'International Trade Agreements: Vehicles for Regulatory Reform?' (1997) *U. Chi. Legal F.* 331, 355-63.

ment at which the public, broadly defined to include all private parties such as business and industry, experts such as scientists, the press, public interest organizations, and individuals, might have an interest: in the formulation of non-binding expectations on the one hand and in encouraging compliance with and implementation of a non-binding instrument on the other.

While Ms Zarsky notes in the case of APEC that 'both research and advocacy NGOs were left standing outside the gate' of intergovernmental consultations and deliberations, such a result is not a necessary consequence of the informal, non-binding character of APEC. Indeed, there are few generalizations that can be made linking the binding or non-binding nature of an international setting to the question of transparency and accountability to nonstate actors or the public generally. The text of a major, binding multilateral agreement on the protection of endangered species entrenched rights of participation for nongovernmental organizations more than twenty-five years ago<sup>19</sup> while the formally-established WTO, which adopts binding rules, has declined to take analogous steps.<sup>20</sup>

In contrast with APEC, the process for adopting ISO standards, as described by Professor Roht-Arriaza, is prescribed with exquisite precision and is anything but *ad hoc*. She is more than justified in pointing out that the participation of environmental groups and other members of the public, though expanding, remains small, at least in United States practice in ISO. The practical reality is that few representatives of stakeholders from sectors other than business and industry have the resources of time or money to participate effectively in ISO processes. The result is that independent voices contribute little to consensus on the national level and, perhaps more importantly, have insufficient leverage to impede or frustrate consensus as that term is defined in the ISO context. The implementation phase consists largely of accrediting certifiers who then certify individual companies to the ISO 14001 standard, during which there is little if any opportunity for meaningful public participation.<sup>21</sup>

<sup>19</sup> Art. XI, para. 7 of the Convention on International Trade in Endangered Species of Wild Flora and Fauna, March 3, 1973, art. XI(7), 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, reprinted in (1973) 12 I.L.M. 1035, specifically provides for participation by non-voting observers in meetings of the parties to that agreement.

<sup>20</sup> See Guidelines for Arrangements on Relations With Non-Governmental Organizations, W.T.O. Dec. No. WT/L/162 (July 18, 1996) (available at website <<http://www.wto.org/ngo/guide.htm>>) ('As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.'). Cf. United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, para. 110 (October 12, 1998), (1999) reprinted in 38 I.L.M. 118 (1999) (available at website <<http://www.wto.org/wto/dispute/distab.htm>>) (WTO dispute settlement panel report concluding that panels have authority to accept unsolicited submissions from nongovernmental actors).

<sup>21</sup> Since 1997 the author has served, first, as a representative of environmental group stakeholders and currently as an at-large member, on the Management Committee for the

This theme of untapped potential for public participation echoes through the other cases as well. Professor Simmons describes an evolution in the involvement of affected business communities in the FATF's work. The World Bank's quasi-adjudicatory Inspection Panel process can be initiated by private parties meeting the Bank's eligibility requirements, and is in many respects a high water mark for public participation in implementation and compliance. Public participation can be expected to increase the perception of legitimacy, as well as enhancing efficacy in at least some circumstances.<sup>22</sup>

Despite obvious benefits under certain circumstances, the flexibility and *ad hoc* character of many non-binding undertakings do not necessarily facilitate participation or direct accountability at either the international or the domestic levels. As Ms Zarsky's case study implies, it may well be that the fluidity of an institution such as APEC makes it easier to exclude nonstate actors by default, without an articulated policy or formal decision, than it might be in a more highly structured context such as the WTO. In general there are two principal, and far from mutually exclusive, points for nonstate actors in multilateral processes, both 'hard' and 'soft' to enter directly into the international consultations, or indirectly, through participating national governments. The efficacy of either or both of these approaches may be attenuated because of the non-binding character of a particular international undertaking.

In the United States, international agreements that are treaties in the Constitutional sense require that the Senate give advice and consent to ratification. The process often includes scheduled hearings and other less formal consultations with nongovernmental actors, presenting an obvious occasion for participation by concerned members of the public. In anticipation of this process, the Executive Branch may well find it advantageous to grant those constituencies access to the negotiating process in the first instance. In the case of non-binding instruments, there often is no notice of governments' intent to initiate discussions and the process may not be open to participation by nongovernmental observers. On the other hand, the very attribute of informality that characterizes most, if not all, non-binding international efforts may also facilitate the creation of entry points for nonstate actors in a low-profile manner that would be perhaps somewhat less likely in an established intergovernmental organization or in the negotiation of a binding international agreement.

Although the implications for compliance with non-binding norms of the elements discussed above are not entirely evident, it is nonetheless possible to make some general observations. Among the case studies presented in this

Environmental Management System (EMS) component of National Accreditation Program (NAP), a joint undertaking of the American National Standards Institute (ANSI) and the Registrar Accreditation Board (RAB).

<sup>22</sup> See generally Wirth, D.A., 'Reexamining Decision-Making Processes in International Environmental Law' (1994) 79 *Iowa L. Rev.* 769.

section, APEC probably comes closest to what is customarily regarded as a purely non-binding scheme. This impression is particularly strong when APEC's structural and institutional attributes are juxtaposed with the GATT/WTO regime, whose progress toward a system of enforceable rules based on the rule of law has been noteworthy in recent years. By contrast with the WTO, undertakings in APEC obviously have a nonbinding, voluntary character. Of the four case studies in this section, APEC environmental standards, which largely represent the agenda of a small number of states and clash with other perceived interests of the member states, consequently are set in an institutional context in which the impact on actual state behavior would be expected to be the least. In addition, the norms are not only soft in form, they are soft in content.

The case study of the World Bank can be elucidated most readily as creating enforcement mechanisms to implement binding standards. After the creation of the Inspection Panel, the Bank's internal standards are clearly segmented into binding and non-binding categories, with the former amenable to enforcement through the Inspection Panel mechanism and the latter not. It is probably no coincidence that the 'reformatting' of the Bank's internal standards into neatly-defined categories roughly coincided with the creation of the Inspection Panel; prior to that development there was considerably less need for this conceptual distinction. While the Inspection Panel may have contributed to improving compliance by both Bank staff and borrowing countries with binding internal norms, one could hardly reach that conclusion with respect to non-binding instruments, which are not amenable to application through the Inspection Panel process. Indeed, the Panel's capacity to apply even binding standards exogenous to the Bank is highly circumscribed. Somewhat perversely, the creation of the Inspection Panel may actually reduce compliance with certain standards. When the reformatting process was initiated on a systematic basis, a number of observers alleged that some of the Bank's standards were purposefully being 'downgraded' to non-binding status. Whether that is so or not has been difficult to document, but the potential for this kind of 'negative feedback' is clear.

Particularly when viewed against the baseline of the other two analyses, the case studies of the FATF and ISO are perhaps most notable for their potential, notwithstanding the non-binding format, to encourage performance or compliance by third parties whose commitment is reluctant or equivocal. The leverage possible and the strong financial incentives behind the FATF and similar efforts to combat money laundering may induce some states to comply that otherwise would not and may stimulate some states to pressure others to comply. Although ISO standards are described as adopted by consensus, 'consensus' in ISO is defined not as unanimity, as in most intergovernmental organizations, but supermajority. Once adopted, ISO standards are often sufficiently widely implemented that even objectors have little

realistic choice but to comply. That attribute is the whole point of the Organization's existence and the obvious key to the success of its initiatives, notwithstanding their nonbinding, extragovernmental character. When applied in social policy areas such as environment, the approach can be a weakness as well, especially if the distribution of interest group representation is perceived as less than adequate and the work product therefore lacking in fundamental indicia of legitimacy.

With the notable exception of the World Bank, one might well observe that a hard law form of the norms discussed in this section would not have brought greater compliance and certainly would not have been more effective. The norms were drafted in non-binding form for strong reasons that make it unlikely, or in the case of ISO impossible, to envisage binding obligations in their place. The choice appears to have been between non-binding norms and no norms, not between non-binding norms and binding ones. Even if a binding text could have been agreed, it seems probable that the contents of the norms would have been weaker than the agreements that were reached. If these conclusions are correct, they suggest that legal form does make a difference, that states take seriously their legal obligations, but that in resolving problems of international concern, formal legal obligation is not always the most efficacious means to achieve the goals of international cooperation.